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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re WILLIAM W., et. al., Persons Coming Under the Juvenile Court Law.	
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. MELISSA M-W., et. al., Defendants and Appellants.	D070290 (Super. Ct. No. J517046)

APPEALS from a judgment of the Superior Court of San Diego County, Sharon L. Kalemkiarian, Judge. Affirmed in part and conditionally reversed with directions.

The Law Office of Richard L. Knight and Richard L. Knight, under appointment by the Court of Appeal, for Defendants and Appellants.

Thomas E. Montgomery, County Counsel, John E. Philips, Chief Deputy County Counsel and Kristen M. Ojeil, Deputy County Counsel, for Plaintiff and Respondent.

Melissa M.-W. (Mother) and Asa W. (Father, together the parents) appeal from the juvenile court's judgment terminating parental rights to their sons, William W. (born 2005) and Jeremiah W. (born 2007, together the children) under Welfare and Institutions Code[1] section 366.26.[2] The parents contend that the juvenile court erred by declining to apply the beneficial relationship exception to termination of parental rights. (§ 366.26, subd. (c)(1)(B)(i).) They also assert that the San Diego County Health and Human Services Agency (Agency) did not comply with the notice provisions of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). The Agency concedes the notice error.

We conclude that the juvenile court did not err in finding that the beneficial relationship exception did not apply, but conditionally reverse the judgment and order a limited remand for the sole purpose of requiring compliance with ICWA notice.

FACTUAL AND PROCEDURAL BACKGROUND

Background

Mother reported that she "raised herself" and started using marijuana at age 11 and methamphetamine at age 18. Father reported that he was born addicted to heroin, that his mother physically beat him, and that he started using marijuana at age 13 and methamphetamine at age 23. William W. is in good physical health, but suffers from developmental delays and Attention-Deficit/Hyperactivity Disorder. Jeremiah W. has been diagnosed with "Vertical Oculo Auriculo Malformation Sequence and Atresia

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1 Undesignated statutory references are to the Welfare and Institutions Code.

2 S.M. (born 2002), the children's half-sister, is not a subject of this appeal.

Golden Har's Syndrome." He has incompletely developed facial features on one side and suffers from hearing loss in one ear. He has average intelligence and normal physical development. Both children are described as cute and likeable.

In 2008, the Agency filed a petition alleging failure to protect as the family home was filthy and unsanitary with insects, dirty diapers throughout the home, full cat litter boxes and half eaten food throughout the residence. At that time, the parents participated in individual therapy, parenting education and received services from eight organizations or agencies. The Agency dismissed the petitions with the parents agreeing to a voluntary plan.

In 2009, the family declined voluntary services which were offered to address continued issues of unsanitary living conditions. The Agency received referrals for the family in 2011 and 2012, again due to unsanitary living conditions and allegations that the children were locked in a bedroom all day.

The Instant Petitions

In June 2012, the Agency received a referral stating that when Jeremiah W. returned to school after being out for several days, he was comatose-like, but became more responsive and began speaking after eating several meals. During an unannounced visit to the family home a social worker noted an offensive odor of urine and cigarette smoke, bags of trash throughout the apartment, heavily soiled mattresses, dried feces on the kitchen floor and extreme clutter. The Agency filed detention petitions for the children alleging that the family home was in disrepair and unsanitary. Amended petitions alleged that the parents' drug used rendered them unable to care for their

children. During its investigation, the Agency learned that Jeremiah W. had over 51 absences from his four-day per week school and suffered a fifty percent delay in speech and language. William W. had 19 absences from his elementary school and had not met any of his milestones.

In September 2012, the juvenile court removed custody of the children from the parents and placed them in a foster home. At the six-month review hearing in April 2013, the juvenile court placed the children back in their Father's care, with unsupervised visits for Mother. By October 2014, the children continued to reside with Father, however, the family home was infested with cockroaches, and the family moved into a motel using vouchers.

In early May 2015, the Agency received a referral alleging neglect. William W.'s school reported that he was dirty and wore the same "filthy" clothing every day. He stated that his parents stayed up all night and sold pills. In June 2015, the Agency received another referral as the children were "horribly dirty and filthy." Later that month, the juvenile court ordered the children detained out of the parents' care upon the Agency's recommendation. The Agency filed section 387 petitions and recommended no further reunification services. In September 2015, the juvenile court made a true finding on the section 387 petitions, ordered the children removed from the parents' care, terminated services for the parents and set a section 366.26 hearing. The juvenile court ordered liberal supervised visitation for the parents with discretion to expand.

In early August 2015, the Agency placed the children with new foster caregivers. As of December 2015, the caregivers were uncertain about adoption, but by February 2016, the caregivers indicated that they would adopt the children if parental rights were terminated. In April 2016, Father filed section 388 petitions alleging that he had obtained stable employment and suitable housing. On April 19, 2016, the juvenile court began the contested section 366.26 hearing by summarily denying the Father's section 388 petitions. The juvenile court later terminated parental rights and ordered adoption as the permanent plan for the children. The parents timely appealed.

DISCUSSION

I. *ICWA*

The parents contend that the juvenile court erred in finding notice under ICWA was not required because the Agency knew that Father possibly had Sioux tribal heritage, yet the record does not disclose that the Agency fully investigated the claim, nor were ICWA notices sent to any of the Sioux tribes. The parents seek a limited remand for ICWA compliance. County counsel concedes that a limited remand is appropriate so that proper notice under ICWA can be given. We agree.

Father submitted form ICWA-20 (Parental Notification of Indian Status) indicating that he may have Indian ancestry with the Sioux tribe on his maternal side. The social worker acknowledged this information. Despite knowing that Indian heritage existed on Father's maternal side, the social worker requested information about Father's paternal side and contacted the paternal grandfather. Father indicated that he did not

know where his mother lived and that his grandmother, Nancy, lived in Sacramento, but he did not know her last name. While the social worker indicated that she was unable to contact the Father's maternal grandmother, she did not indicate what, if any, efforts were undertaken to locate her. Notably, the social worker had the name and birthdate of Father's stepfather, the names of his stepsister and two brothers, one of whom was incarcerated. These individuals might have had contact information for the Father's maternal relatives.

We find the juvenile court erred in determining that ICWA did not apply. The information provided by Father triggered the Agency's obligation to investigate Sioux heritage and provide notice as applicable. (Cal. Rules of Court, rule 5.481(a)(5)(A); § 224.3, subd. (b)(1); *In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1165 ["[T]he juvenile court needs only a suggestion of Indian ancestry to trigger the notice requirement."].) Where, as here, the court has reason to know an Indian child is involved, the Agency must notify the affected Indian tribes about the proceedings and of their right to intervene. (25 U.S.C. § 1912(a); see *In re Gerardo A.* (2004) 119 Cal.App.4th 988, 994.) The "juvenile court's failure to secure compliance with the notice provisions of . . . [ICWA] is prejudicial error." (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1424.) Thus, the matter must be conditionally reversed for proper notice.

II. *Beneficial Relationship Exception*

The juvenile court found that the children were adoptable. This finding is supported by the record and not contested by the parents. The parents assert that the juvenile court erred in ordering adoption as the permanent plan because the beneficial relationship exception applied. Mother contends that the juvenile court abused its discretion by discounting two bonding studies. While Mother concedes it is too late for her to reunify with her children, she asserts guardianship is the appropriate option because her relationship with her sons outweighed the benefits of adoption. Father does not seek return of the children, but claims that his relationship with them is valuable and should be saved.

The permanency planning hearing aims "to end the uncertainty of foster care and allow the dependent child to form a long-lasting emotional attachment to a permanent caretaker." (*In re Emily L.* (1989) 212 Cal.App.3d 734, 742.) The primary consideration at the hearing is the best interests of the child. (*In re Kerry O.* (1989) 210 Cal.App.3d 326, 333.) At the permanency planning hearing the court has four choices, with termination of parental rights and ordering that the child be placed for adoption, as the first choice. (§ 366.26, subd. (b)(1).) "Guardianship, while a more stable placement than foster care, is not irrevocable and thus falls short of the secure and permanent future the Legislature had in mind for the dependent child." (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1344.)

Whenever the court finds "that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption" (§ 366.26, subd. (c)(1)), unless it finds one of four specified circumstances in which termination would be detrimental. (§ 366.26, subd. (c)(1)(A)-(D).) One of the exceptions to the preference for adoption is the beneficial parent-child relationship exception, which exists where a parent has "maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).)

The parents contend that they regularly visited with the children and that the first prong of regular visitation had been met. The Agency does not challenge this finding. Accordingly, we focus on the second prong and examine whether the children would benefit from continuing their relationship with their parents. (§ 366.26, subd. (c)(1)(B)(i).)

A beneficial relationship is one that promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with adoptive parents. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) The parent must show that the parent-child relationship is such that the child will be greatly harmed by the termination of parental rights, so that the presumption in favor of adoption is overcome. (*In re Brittany C.* (1999) 76 Cal.App.4th 847, 853-854.) Implicit in this standard is that "a *parental* relationship is necessary for the exception to apply, not merely a friendly or familiar one." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.) The existence of this relationship is determined by taking into consideration "[t]he age of the child, the

portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs . . . ." (*In re Autumn H.*, at p. 576.) We review the factual issue of the existence of a beneficial parental relationship under the substantial evidence standard of review and the determination of whether there is a compelling reason for finding that termination would be detrimental to the child under the abuse of discretion standard. (*In re Anthony B.* (2015) 239 Cal.App.4th 389, 395; *In re J.C.* (2014) 226 Cal.App.4th 503, 530-531.)

The Agency and juvenile court found that the children were bonded to both parents. Accordingly, the juvenile court performed the "difficult task" of balancing permanency with the parent-child bond, noting that it needed to consider the quality of the parent-child bond when weighing the potential benefits of a permanent home. The court considered the bonding studies, but noted that these studies presented a "snapshot" of the parent-child relationship that could not capture the "color" or "substance" of the relationship. The juvenile court ultimately determined that the children would not be greatly harmed if the parent-child relationship were severed because the parent-child bond was "not so healthy and substantial" as to "outweigh a healthy and substantial relationship [that the children had] with [their] new caregivers." As we shall explain, the juvenile court did not abuse its discretion in finding that termination of parental rights would not be detrimental to the children.

The parents abused drugs for most of their lives. During the three years that elapsed from the time the children were initially removed, to the time that the trial court terminated reunification services, the parents made commendable progress in addressing

their long-term substance abuse by testing negative for substance use. The social worker concluded, however, that Mother remained at risk for relapse as she never completed her substance abuse treatment and failed to enroll in available programs after the court terminated her services. Notably, the Agency removed the children from the parents in June 2015 based on reports that the parents were buying and selling drugs. At that time, the Agency remained concerned about Mother's mental health as she had inappropriate outbursts in front of the children and refused to take her prescribed mental health medication. Additionally, the social worker concluded that Mother had "very limited parenting skills" and left most of the parenting to Father. While Father had developed some parenting skills, his full-time employment left him unable to provide the care that the children needed.

Where, as here, there is no probability of reunification with a parent, adoption is the preferred permanent plan. (*In re Celine R.* (2003) 31 Cal.4th 45, 53.) Contrary to Mother's argument, the juvenile court considered the two bonding studies and agreed that the children were bonded to both parents. The difficult question—and the one subject to our deferential review for abuse of discretion—was whether the relationship the children had with their parents warranted rejecting adoption.

On this point, Dr. Yanon Volcani, one of the bonding study psychologists, stated that his bonding study was simply one piece of data in a "much, much bigger, more complex question" regarding a permanent plan for the children. Dr. Volcani sagely noted:

> "And then the issue of what do we do with the fact that these kids are going to be in limbo land if they're not returned to their parents? Isn't that awfully draining on them? Then there's a terrible decision, thank God I don't have to make it. The dear wise judge has to make it, as to . . . creat[ing] stability through adoption or . . . leav[ing] the[] [children] in guardianship whe[re] they are allowed to see the parent, but . . . has [the] inherent instability of the parents . . . coming back and . . . wanting the return of the minors. So it leaves a certain potential insecurity or false hope [for the children]. Complicated."

The juvenile court understood the momentous decision it was required to make, asking Dr. Volcani, whether the "false hope of a guardianship in a theoretical sense [could] harm the child[ren] because they don't end up bonding with a new caregiver?" Dr. Volcani responded: "[O]f course. . . . And that is not—in a sense, purposefully, never mind, non-consciously rejecting any feelings of attachment towards the caregivers because they're not the bio[logical] parents and you[] [are] . . . wait[ing] for the idealized parent [to] eventually come . . . ."[3]

Mother asserts that adoption is not an inherently permanent placement, citing *Jones T. v. Superior Court* (1989) 215 Cal.App.3d 240, 251, *In re Emily L.* (1989) 212 Cal.App.3d 734, 742 and *In re Micah S.* (1988) 198 Cal.App.3d 557, 566 (*Micah S.*), for the proposition that an adoption is not irrevocable if the adopting parents do not " 'make a

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3 Dr. Diana Pickett, who conducted the second bonding study, recommended guardianship. Dr. Pickett opined that it would be detrimental to the children if they were adopted because this would cut them off from their biological family, including Mother, Father, grandmother and cousins, that the children loved being with. It is undisputed that the children are bonded to Mother and Father; however, there is nothing in Dr. Pickett's report or the record supporting her conclusion that the children were bonded to any extended family members.

full commitment to the child.' " The language Mother relies on originated in *Micah S.* and has been taken out of context.

The *Micah S.* court summarized the thesis of an authoritative treatise regarding child welfare, stating: "The child's interests take precedence over the rights, needs and wishes of biological parents. The state should not lightly intrude into the relationship between parent and child. But once neglect, abandonment or abuse has dictated removal, the separation of a child from a parent has devastating emotional consequences so as to make imperative an early new bonding with a person or persons who fulfill a child's psychological needs for stability, interaction, companionship, interplay and mutuality. Foster placement, being temporary, does not do the trick because it warns the adults against any deep emotional involvement with the child. Even adoptive parents may hesitate to make a full commitment to the child as long as the placement is not irrevocable." (*Micah S.,* at p. 566.) Viewed in context, *Micah S.* supports adoption for these children.

Mother also notes that adoption is not necessarily permanent because an adoption can be disrupted before the adoption is finalized, or an adoption can be dissolved after it is finalized. (See: *Adoption Disruption and Dissolution* (June 2012) Child Welfare Information Gateway < http://www.childwelfare.gov/pubs/s_disrup.cfm > [as of Nov. 21, 2016.].) However, only about ten to twenty-five percent of adoptions are disrupted, and one to five percent of adoptions are dissolved. (*Id.* at pp. 2, 6.) Moreover, the Legislature has determined that adoption is the preferred choice " 'because it gives the child the best chance at [a full] emotional commitment from a responsible caretaker.' "

(*In re Celine R., supra*, 31 Cal.4th at p. 53.) Accordingly, Mother's argument is a public policy one more appropriately presented to the Legislature. In any event, there is nothing in the record suggesting that the caretakers' proposed adoption of the children would be at risk for disruption or dissolution.

Here, the children have been in limbo during the three years that this case has been pending, regrettably moving between the parents and different foster placements. At the time of the section 366.26 hearing, William W. was nine years old and Jeremiah W. seven years old. Since August 2015, the children have been with a couple who have an approved home study and want to provide the children a permanent home through adoption. William W. was receiving weekly therapy and home services to address non-compliant behavior and tantrums. William W. was making good progress and his caregivers were encouraged by the improvements they have seen in a few months. Jeremiah W. has also been receiving in-home therapy and his caregivers were pleased with the progress he had made at home and at school. The social worker spoke to the caregivers about the psychological evaluation results for each child. After doing so, the caregivers remained committed to adoption.

Given the years of neglect and instability that these children have suffered their need for permanence and stability is especially strong. On this record, the parents have failed to show that the juvenile court acted arbitrarily and beyond the bounds of reason in finding inapplicable the beneficial parent-child relationship exception to adoption.

DISPOSITION

The judgment terminating parental rights is affirmed. The finding that ICWA does not apply is conditionally reversed and the matter is remanded to the juvenile court with directions to order the Agency to comply with ICWA. After proper ICWA notice, if it is determined that the children are Indian children and that ICWA applies to these proceedings, the children, the parents, or any relevant tribe may petition the juvenile court to invalidate any orders that violated ICWA. If, after proper notice, the court finds that the children are not Indian children, the finding that ICWA does not apply shall be reinstated.

IRION, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.